Filed 8/13/12 In re A.N. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.N., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. T.N. et al., Defendants and Appellants.	G046172 (Super. Ct. No. DP-021426) O P I N I O N

Appeals from a judgment of the Superior Court of Orange County, Cheryl L. Leininger, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant T.N.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant P.N.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

* * *

After a combined jurisdictional and dispositional hearing, the juvenile court found half-siblings A.N. and L.N. dependents under Welfare and Institutions Code section 300, subdivisions (b) (failure to protect child from substantial risk of harm), (g) (child left without provision for support), and (j) (sibling abuse). (All further statutory references are to this code.) By clear and convincing evidence the court also found that to vest custody of either child with P.N., their mother, and to vest custody of A.N. with T.N., her father, would be detrimental and placed both children in the custody of the Orange County Social Services Agency (SSA).

Applying section 361.5, subdivision (b)(10) and (11), the court ruled mother need not be provided with reunification services to either child and set a permanency planning hearing for L.N. (§ 366.26.) Mother challenged this ruling by a writ petition that was denied in a prior opinion. (*P.N. v. Superior Court* (Feb. 22, 2012, G046184) [nonpub. opn.].) Father was granted reunification services as to A.N.

Both parents appeal the judgment concerning A.N. Father contends the evidence fails to support the juvenile court's jurisdictional and dispositional rulings. He also claims the court erred in failing to find him to be L.N.'s presumed father. Mother asserts the juvenile court erred in not placing A.N. in father's custody. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Mother has an extensive criminal record and an unresolved history of substance abuse. L.N. and A.N. are her ninth and tenth children. Five of mother's children tested positive for cocaine at birth, were declared dependents of the juvenile court, and ultimately adopted. She placed a sixth child for adoption through a private agency. The remaining two siblings were placed with paternal relatives. Although mother claimed to have completed a substance abuse class, she never presented any supporting documentation to SSA.

L.N. was born in November 2009, shortly after mother's release from prison for a drug conviction. During this pregnancy, mother and father began living together. According to the social worker assigned to this case, the couple had mutual friends and knew each other before their cohabitation began.

Father also has a lengthy criminal record. It includes arrests and convictions for driving while under the influence, burglary, receiving stolen property, assault, and possession of a controlled substance, the last of which occurred in 2007. He also had not completed a substance abuse program.

In January 2011, while pregnant with A.N., mother was arrested for selling cocaine. After her arrest, mother told the police she had made 20-to-30 drug sales in the past week and kept her drug inventory at home behind the ventilation screen at the base of the refrigerator. Mother also admitted meeting with her supplier daily at the family home and receiving from him a cell phone buyers used to contact her to arrange drug purchases. The police searched the home, finding additional cocaine and a scale under the refrigerator.

Father was home when the search occurred. He told a social worker that he did not know about mother's drug sales because he worked in construction every day. But when cross-examined at the jurisdictional/dispositional hearing, father admitted

being home three-to-four days a week. He denied knowing mother was meeting with her drug supplier every day at the family home, but acknowledged "[meeting] him out in the street" and "drink[ing] coffee" with the supplier.

After her arrest, mother arranged for a friend to care for L.N. In June 2011, while in prison, she gave birth to A.N. At the time, father and L.N. were living in the home of mother's friend, Lien T. Mother arranged for Lien T. to assume custody of A.N.

Initially, SSA filed a non-custody petition based on mother's incarceration and her prior history with the juvenile dependency system. The petition alleged father's whereabouts were unknown.

In early July, SSA removed both children from the home after conducting a more extensive assessment of the home's living conditions and learning Lien T. and several other adults living there had criminal records. According to a social service report, the room in which the children were staying was in disarray with cockroaches crawling on the floor and wall.

When SSA questioned him, father acknowledged Lien T.'s home "was 'a mess'" and "that he had concerns" about the residence. But he accepted Lien T.'s assurances she could properly care for the children.

Father made his first appearance in the case on August 9. Based on the parties' stipulation, the juvenile court found him to be A.N.'s presumed father and appointed counsel to represent him. At that time, SSA filed the operative second amended petition. Under the failure to protect count, it alleged father "has a criminal history" and "a history of substance abuse" that "is an unresolved problem," and he "reasonably should have known . . . mother . . . was engaged in the sale of illegal drugs . . . ."

The court authorized father to have visitation with both children. In September, he was arrested and spent six days in jail on a parole violation for one of his prior convictions. Father's visitation with the children was inconsistent.

He missed or cancelled at the last minute several visitation appointments and ended some visits early. At the December jurisdictional and dispositional hearing, the assigned social worker testified "[p]arents are given three no-shows or cancellations and then the social worker has to reinstate [visitation,]" and noted that with father she "had to [reinstate his visitation] four times . . . ."

The social service reports indicated that during visits "father responds appropriately some of the time," but he "appears to have difficulty dividing his attention between the two children and reportedly is attentive and focused on [A.N.] with [L.N.] playing independently and having little interaction." He ended one visit an hour early because of A.N.'s "consistent and inconsolable crying."

The court also authorized funding to have father participate in random drug testing. He never tested positive for any substance. But father missed several tests and one result was described as diluted. Under SSA's rules, the missed and diluted tests were deemed to be positive results.

SSA provided father with a referral to a counseling and parenting program, but he was terminated due to his lack of response.

At the December combined jurisdictional and dispositional hearing on the amended petition, the juvenile court admitted several social service reports and heard testimony from both the assigned social worker and father. Father testified he still worked in construction and for the past several months had been renting a room in a home owned by what he described "an adopted brother[,] like a cousin, an acquaintance." Father could not remember the name of the street where he lived, but said he "[wrote] it down on [a] piece of paper" that he gave to his attorney.

With a few modifications, the court found the second amended petition's allegations were true. It concluded mother had been involved in drug sales, keeping "her supply of drugs . . . in the trailer where they lived" under "the bottom of the refrigerator," which, "being [at] ground level with a removable vent cover and mother retrieving drugs

from that location numerous times would have been accessible to the child." The judge also noted the "inherent dangers associated with drug transactions . . . and a drug lifestyle" and concluded this "created a dangerous, unsafe, detrimental environment for [L.N.] and, potentially, for [mother's] unborn child [A.N.] Had mother not been arrested, the court believes she would still be continuing her drug activities."

Additionally, the judge stated she "did not find father's testimony to be credible . . . ." Based on that determination, plus his "missed . . . and diluted test[s,] . . . prior history of drugs and knowingly living in a drug environment," the court held "father's substance abuse is unresolved . . . ." It further found "father knew of mother's drug involvement and activities," or "[a]t a minimum, he certainly should have known. The signs were obvious." Thus, "[w]hile there is no evidence that father was personally involved in the transactions, based on the obvious activities, . . . father knew of the drug activities and, at a minimum, acquiesced to the activities . . . in spite of the potential danger to the children."

DISCUSSION

1. Sufficiency of the Evidence to Support the Jurisdictional Order

Because of the nature of father's arguments, discussed in greater detail below, it is necessary for us to initially review the general rules of appellate review applicable to this case.

"In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the

inferences to be drawn from evidence are the domain of the trial court, not the reviewing court . . . . [Citations.]" (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

However, father's opening brief relies heavily on his and mother's credibility and interprets the facts in the light most favorable to him. This distorted review of the appellate record is inappropriate. We begin our analysis with the presumption the trial court's judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Ibid.*) Thus, "'[i]t is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' [Citations.]" (*Foreman & Clark v. Fallon* (1971) 3 Cal.3d 875, 881.) These principles apply to appeals in juvenile dependency proceedings. (*In re S.C.* (2006) 138 Cal.App.4th 396, 414-415.)

"A recitation of only [the appellant's] evidence is not the 'demonstration' contemplated under the above rule. [Citation.] Accordingly, if, as [is] here contend[ed], 'some particular issue of fact is not sustained, [the appellant is] required to set forth in [his] brief *all* the material evidence on the point and *not merely [his] own evidence*. Unless this is done the error assigned is deemed to be waived.' (Italics added.) [Citations.]" (*Foreman & Clark v. Fallon, supra,* 3 Cal.3d at p. 881; *In re S.C., supra,* 138 Cal.App.4th at pp. 414-415.) That is the case here.

But even on the merits, father's claims fail. "Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) "Cases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child's environment . . . . [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]" (*Id.* at p. 824.)

Here, both scenarios exist. The juvenile court cited mother's extensive history of drug abuse and criminal activity, particularly her most recent illegal drug sales wherein she used the space underneath the refrigerator to store her drug inventory. L.N. was a toddler at the time and the juvenile court found, absent mother's arrest, she likely would have continued selling drugs even after A.N.'s birth.

In *Rocco M.*, the appellate court held "the trial court could find a substantial risk of serious physical harm in the fact that . . . mother created the danger [her 11-year-old child] would ingest hazardous drugs" (*In re Rocco M., supra,* 1 Cal.App.4th at p. 825) "by placing or leaving drugs in a location . . . where they were available to [the child,] . . . by frequent and prolonged absences which created the opportunity for [the child] to ingest the drugs[,] . . . and . . . by exposing [the child] to her own drug use, thus impliedly approving such conduct and even encouraging him to believe that it is an appropriate or necessary means of coping with life's difficulties" (*ibid.*). The facts of the present case present a more compelling basis for jurisdiction. Mother not only had a substance abuse problem and left drugs in a place readily available to small children, but with father's apparent knowledge and acquiescence, was engaged in the frequently dangerous activity of selling illegal drugs.

Father's focus on himself misses the point. "Contrary to father's position, a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citations.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent. [Citation.]" (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.)

Even so, the court's findings as to father also supported jurisdiction. Contrary to his argument, the juvenile court did not base its jurisdictional finding on his purported residential instability. Nor did the court merely rely on his past criminal record and drug use. Rather, the court concluded his cohabitation with mother while aware of

her drug activities, indicated he acquiesced in this conduct, thereby failing to take steps to protect L.N. from mother's behavior. And absent mother's arrest, father likely would have also failed to protect A.N. once she was born.

Father argues mother's arrest eliminated the potential of any current danger to A.N. The foregoing facts combined with the evidence of father's own unresolved substance abuse, his knowingly leaving the children in Lien T.'s care, plus his poor performance in complying with the services SSA offered to him, support a conclusion a substantial risk of harm to A.N. continues to exist.

Finally, father contends that, even if the record supports the juvenile court's exercise of jurisdiction under section 300, subdivision (b), we must discuss the validity of the remaining grounds contained in the amended petition. The general rule is that "[w]hen a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence," and "[i]n such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence. [Citations.]" (*In re Alexis E., supra,* 171 Cal.App.4th at p. 451; see also *D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1127 ["the juvenile court's jurisdiction may rest on a single ground"].) But even if the rule were otherwise, it would not assist father. The amended petition alleged three grounds for jurisdiction; section 300, subdivisions (b), (g), and (j). Father is not mentioned in the allegations relating to subdivision (j). The only reference to him in the subdivision (g) count was that his "whereabouts . . . [were] unknown." At the combined jurisdictional and dispositional hearing, the juvenile court struck this allegation. Consequently, only the allegations of subdivision (b), relating to father's failure to protect the children from a substantial risk of harm, are relevant here.

2. Sufficiency of the Evidence to Support the Dispositional Order

Section 361, subdivision (c)(1) declares "[a] dependent child may not be taken from the physical custody of his or her parents . . ., unless the juvenile court finds clear and convincing evidence" that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." The juvenile court found, "by clear and convincing evidence that to vest custody . . . with father at this time would create a substantial risk of detriment and danger to the children." (§ 361, subd. (c)(1).) Both father and mother contend the evidence fails to support this finding. We disagree.

As with jurisdiction, we review the juvenile court's factual findings on this issue under the substantial evidence standard. (*In re Javier G.* (2006) 137 Cal.App.4th 453, 462-463.) In addition, "[t]he juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order. [Citation.]" (*Id.* at p. 462.) "'A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citations.]' [Citations.]" (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 969.)

In explaining its dispositional ruling, the juvenile court stated: "[A]t the time of [A.N.'s] birth, according to mother, father's whereabouts were unknown; although, presumably, she knew that [L.N.] had initially been left with the father[.] [F]ather has not lived with [A.N.] Father . . . placed [L.N.] – and potentially the unborn child – in danger by his poor . . . and inappropriate judgment by allowing the children to be exposed to [the] drug activities discussed above. [¶] Father[] also[] stated that he was

caring for [L.N.] and admitted to going out of the county to work leaving [L.N.] in the care of someone he had concerns about. This, again, place[d L.N.] in an unsafe environment and showed poor judgment. . . . [¶] Also, mother obviously had concerns about father caring for either child[] because when she attempted to make arrangements with the caretaker for the children, she did not want either of the children cared for by the father . . . . [¶] Since the children have been detained, father has been inconsistent with his visits. Further, another person has been supplying the caretaker with some of the supplies for [A.N.], such as formula and diapers. . . ."

These findings, which were based on the evidence, plus the findings supporting the juvenile court's jurisdictional ruling justify its decision to vest custody of A.N. with SSA. Father knew or should have known about mother's participation in illegal drug sales and did nothing to protect L.N. from the potential harm. The court explicitly found his testimony to the contrary lacked credibility. Further, the evidence supports the juvenile court's finding that father has an unresolved substance abuse problem and displayed poor judgment in caring for the children after mother's arrest and incarceration. His inconsistent visits with the children and failure to follow through in attending parenting and counseling classes reflect he still lacks the ability to protect A.N. from the risk of harm.

This case is unlike *In re Basilio T.* (1992) 4 Cal.App.4th 155, the case cited by father in support of his argument. There we cited "the skimpy nature of the information in the social study report," the fact that "a live witness, whom the trial court explicitly found credible" "contradicted" "the reports by the complaining neighbors," plus the fact that the "incidents of domestic violence" involved only "the adults . . . fighting with each other" to hold the evidence failed to support the children's removal under the clear and convincing evidence standard. (*Id.* at p. 171.) In this case there was overwhelming evidence mother's behavior created a substantial risk of harm to the children and father either knew about it and acquiesced in the activity or ignored the

unmistakably dangerous nature of the activity. Even after mother's arrest and the commencement of this dependency proceeding, father failed to take adequate steps to protect the children from the risk of harm. The evidence supports the juvenile court's conclusion father could not adequately protect A.N. if she were placed with him.

Mother argues the juvenile court's dispositional ruling affects her as well "because it brings the case one step closer toward the possible termination of [her] parental rights," and "if the order denying [A.N.]'s placement with father is reversed, the no reunification services order issued against mother would also need to be reversed . . . ." Since the juvenile court ordered reunification services to father the first ground is purely speculative. As for the second ground, our prior decision in *P.N. v. Superior Court, supra,* G046184 bars such a result. "Since there is a previous final decision of . . . this court involving the identical facts in the same case between the same parties . . ., such rule is now the law of the case and is binding . . . ." (*Guardianship of Walters* (1947) 81 Cal.App.2d 684, 685; see also *People v. Stanley* (1995) 10 Cal.4th 764, 786.)

Therefore, we conclude the juvenile court did not err in vesting custody of A.N. with SSA rather than father.

3. The Presumed Father Claim

At father's initial appearance in this case, when the juvenile court authorized father to have visitation with A.N., his attorney successfully requested visitation with L.N., noting father "has basically a paternal relationship with [L.N.]," "has lived with [L.N. for his] entire life[,] and . . . [L.N.] probably considers [father] to be his father." During closing argument, in urging A.N. should be returned to father's care, counsel also asserted "father's position is [that] he treats [L.N.] as his own[,] . . . has raised [L.N.] since [L.N.] was very young[,] . . . obviously wants the siblings to remain together and he's . . . willing to keep the siblings together." However, at no point in the

lower court's proceedings did father request the juvenile court declare him to be L.N.'s presumed father.

Nonetheless, on appeal father contends the juvenile court erred in "prevent[ing him] from establishing presumed fatherhood" as to L.N. We disagree.

As SSA contends father forfeited this claim by not asserting it in the juvenile court. "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.] [¶] Dependency matters are not exempt from this rule. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.) While *In re S.B.* also acknowledged "application of the forfeiture rule is not automatic" (*ibid.*), the Supreme Court recognized an "appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue [citations]" (*ibid.*). In "dependency cases . . . the discretion must be exercised with special care" because "these proceedings involve the well-being of children, [and] considerations such as permanency and stability are of paramount importance. [Citation.]" (*Ibid.*)

Father presents no cogent reason for creating an exception to the forfeiture rule under the facts of this case. Clearly, an opportunity to be declared L.N.'s presumed father existed, but he never requested it. As noted, the juvenile court denied mother reunification services as to both children and scheduled a permanency planning hearing as to L.N. Where "the dispositional order also denie[s] reunification services and set[s] a section 366.26 hearing . . . '"the traditional rule favoring the appealability of dispositional orders yields to the statutory mandate for expedited review."' [Citation.] Consequently, the dispositional order . . . [is] not appealable and '[can] be reviewed, if at all, only by way of a writ petition.' [Citation.] And 'failure to take a writ from a nonappealable dispositional order waives any challenge to it.' [Citations.]" (*In re T.W.* (2011) 197 Cal.App.4th 723, 729.) In father's presence, the juvenile court advised mother of her

right to challenge the juvenile court's dispositional order as to L.N. and she timely petitioned for relief. But father failed to challenge the dispositional order as to L.N. by a timely writ petition.

Furthermore, father's notice of appeal in this case mentions only the rulings concerning A.N. Given that juvenile dependency proceedings "involve the well-being of children, [and] considerations such as permanency and stability are of paramount importance" (*In re S.B.*, *supra*, 32 Cal.4th at p.1293), we conclude father has forfeited his right to assert a claim to be declared L.N.'s presumed father.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.